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Striving for Consistency: The Battle of Jurisdiction in Enforcing Arbitration Awards

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STRIVING FOR CONSISTENCY: THE BATTLE OF JURISDICTION IN ENFORCING ARBITRATION AWARDS

Abstract: On January 20, 2017, in *Ortiz-Espinosa v. BBVA Securities of Puerto Rico*, the U.S. Court of Appeals for the First Circuit expanded the U.S. Supreme Court's decision in *Vaden v. Discovery Bank* and held that the "look through" approach to determine federal jurisdiction applied to petitions to enforce, modify, and vacate arbitration awards under the Federal Arbitration Act. The First Circuit relied heavily on the Supreme Court's reasoning in *Vaden* to support its conclusion that applying the "look through" test created a single and consistent jurisdictional approach. This Comment argues that the First Circuit was correct in its application of the "look through" approach because it avoided the "curious practical consequences" that troubled the *Vaden* court.

INTRODUCTION

The Federal Arbitration Act ("FAA") and individual state statutes regulate arbitration, which is a form of dispute resolution in the United States.[1] The FAA provides courts with mechanisms to stay litigation pending arbitration, compel arbitration, and confirm, modify, or vacate arbitration awards.[2] The FAA is unique because it does not on its own provide a basis for jurisdiction in federal court.[3] There must be an independent jurisdictional basis before a party

[1] Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2012); *see* Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 NEV. L.J. 427, 430 (2007) (noting that arbitration law in the United States is governed by the Federal Arbitration Act ("FAA") and state statutes). Most state statutes governing arbitration are based on of the Uniform Arbitration Act ("UAA"). *See id.*; *see also The RUAA Moves Toward National Passage*, DISP. RESOL. J. 5, 5 (May–July 2002) (explaining that forty-nine states have adopted the UAA of 1956 and nineteen states are considering enacting the Revised Uniform Arbitration Act).

[2] 9 U.S.C. §§ 3–4, 9–11. Sections 9, 10, and 11 of the FAA grant courts the power to enforce post-arbitration awards by confirming, modifying, or vacating an arbitration award. *See id.* §§ 9–11. When a judge modifies, confirms, or vacates an arbitration award, the standard of review of the arbitrator's decisions is especially deferential. *See* Dluhos v. Strasberg, 321 F.3d 365, 370 (3d Cir. 2003) (finding that when enforcing arbitration agreements there is a vast deferential standard towards the arbitrator's decision); Stipanowich, *supra* note 1, at 431 (describing how the FAA gives the judicial branch the power to confirm, stay, modify, or vacate both arbitration decisions and awards). The reason that courts are required to give a highly deferential standard to an arbitrator's award is because one of Congress's goals in enacting the FAA was to encourage courts easily affirm arbitration agreements. *See Dluhos*, 321 F.3d at 370 (explaining that the deferential standard that courts give arbitration agreements aligns with the purpose of the FAA).

[3] *See* Vaden v. Discover Bank, 556 U.S. 49, 59 (2008) (noting that the FAA does not provide federal jurisdiction but instead provides access to a federal forum if there is an independent jurisdictional basis); Hall St. Assocs., L.L.C., v. Mattel, 552 U.S. 576, 581–82 (2007) (finding the FAA to be

can access a federal forum.[4] In 2009, in *Vaden v. Discovery Bank*, the U.S. Supreme Court held that in determining whether a federal court had jurisdiction over a FAA § 4 petition to compel arbitration, the court is permitted to "look through" the arbitration agreement to the underlying controversy to establish if it is grounded under federal law.[5] The *Vaden* opinion reconciled a split among circuits regarding the application of the "look through" approach to § 4 petitions, but it created another split among the circuits as to whether the "look through" approach applies to the entire FAA or exclusively to § 4.[6]

The United States Court of Appeals for the Third and Seventh Circuits held that the "look through" approach applies exclusively to § 4 petitions, while the United States Court of Appeals for the Second Circuit found that the "look through" approach extended at least to petitions to vacate arbitration awards under § 10 of the FAA.[7] More recently, in 2017, the United States Court of Appeals for the First Circuit in *Ortiz-Espinosa v. BBVA Securities of Puerto Rico* went beyond the Second Circuit's decision in holding that the "look through" approach applied to petitions to confirm, vacate, or modify arbitration awards

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an "anomaly in the field of federal-court jurisdiction" because it grants no federal jurisdiction); Moses H. Cone Memorial. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 (1983) (explaining that federal jurisdiction over the FAA runs concurrent with state jurisdiction).

[4] *See Vaden*, 556 U.S. at 59 (finding that the FAA does not provide subject matter jurisdiction but rather a federal forum if there is another independent jurisdiction basis); *Hall*, 552 U.S. at 581–82 (citing *Moses H. Cone Memorial. Hosp.,* 460 U.S. at 25 (explaining that the FAA is unique in the sense that it doesn't confer federal jurisdiction on its own); Imre S. Szalai, *The Federal Arbitration Act and the Jurisdiction of the Federal Courts*, 12 HARV. NEGOT. L. REV. 319, 323 (2007) (explaining that in order for a party to have a federal court enforce the FAA, there must be an independent subject matter basis that provides a federal court with jurisdiction).

[5] *See Vaden*, 556 U.S. at 62 (holding that in order to have federal jurisdiction over an arbitration agreement to compel arbitration under § 4 of the FAA, the court should "look through" the § 4 petition to the underlying substantive controversy to determine whether the underlying substantive controversy would provide jurisdiction to the court); *see also* Ortiz-Espinosa v. BBVA Sec. of P.R., 852 F.3d 36, 43 (1st Cir. 2017) (referencing *Vaden*'s holding that the correct inquiry into a petition to compel arbitration under the FAA is whether there would be federal jurisdiction over the parties "save for [the arbitration] agreement"). A § 4 petition is a petition made to a court to compel arbitration pursuant to an arbitration agreement made between the parties. 9 U.S.C. § 4.

[6] *See, e.g.*, *Ortiz-Espinosa*, 852 F.3d at 44 (describing a circuit split and holding that the "look through" approach applied to §§ 9–11 as well as § 4 of the FAA); Goldman v. Citigroup Glob. Mkts., 834 F.3d 242, 255 (3d Cir. 2016) (holding that the "look through" approach did not apply to the provisions outside of § 4).

[7] *See Ortiz-Espinosa*, 852 F.3d at 44–45 (agreeing with the Second Circuit that the "look through" approach extends beyond petitions to compel arbitration under § 4 of the FAA). *Compare Goldman*, 834 F.3d at 254 (holding that the "look through" approach applied to § 4 in *Vaden* did not extend to § 10 motions to vacate arbitration awards), *and* Magruder v. Fid. Brokerage Servs., 818 F.3d 285, 288 (7th Cir. 2016) (finding that the "look through" approach used in *Vaden* did not extend to § 9 and § 10 of the FAA), *with* Doscher v. Sea Port Grp. Sec., LLC, 832 F.3d 372, 389 (2d Cir. 2016) (holding the "look through" approach extended to § 10 petitions to vacate).

under §§ 9, 10, and 11 of the FAA.[8] The First Circuit relied heavily on the Supreme Court's reasoning in *Vaden* that the FAA should be construed in a manner that avoids a "curious practical consequences."[9]

This Comment argues that the First Circuit's decision in *Ortiz-Espinosa* to apply the "look through" approach to provisions outside of § 4 is a practical and necessary extension of the *Vaden* decision.[10] Part I of this Comment discusses the policies behind the FAA and the jurisdictional split among Federal Circuit Courts over arbitration agreements as well as the procedural background of *Ortiz-Espinosa*.[11] Part II explains how the current split among circuits in interpreting the statutory language of the FAA effects federal jurisdiction determinations.[12] Part III of this Comment argues that the First Circuit correctly followed Supreme Court precedent in holding that the "look through" approach is applicable to multiple sections of the FAA because it creates consistency in enforcing the FAA.[13]

I. THE TENSION BETWEEN FEDERAL AND STATE JURISDICTION OVER ARBITRATION

Congress enacted the FAA in 1925 to combat judicial hostility toward arbitration and to encourage the enforcement of arbitration awards by placing them on the same ground as other contracts.[14] The FAA and similar state stat-

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[8] *See Ortiz-Espinosa*, 852 F.3d at 47 (finding the "look through" approach is appropriate to determine if there is federal jurisdiction to vacate, modify, or confirm an arbitration award); *Doscher*, 832 F.3d at 389 (holding the "look through" approach applies to § 10 of the FAA).

[9] *See Ortiz-Espinosa*, 852 F.3d at 46–47 (citing *Vaden* and finding that it would result in "curious practical consequences" to allow a federal court to compel arbitration and forbid a federal court from confirming, vacating, or modifying the same arbitration award); s*ee also Vaden*, 556 U.S. at 65 (finding that it would result in "curious practical consequences" to allow a petitioner to litigate a federal question claim arising out of an arbitration agreement in federal court but not allow a federal court to compel arbitration on the same federal question issue). The First Circuit in *Ortiz-Espinosa* further found that these "curious practical consequences" would lead to inconsistencies in decisions because federal courts would have jurisdiction to compel the arbitration but state courts would be the ones deciding to confirm, modify, or vacate the award because state law could be different from federal law. *See id.* at 47. The court in *Vaden* held that the "look through" approach was proper for § 4 petitions to compel arbitration. *See* 556 U.S. at 65 (explaining that the "look through" approach allowed the court to determine if it had jurisdiction over the matter without requiring the parties to first litigate the issue). It based its conclusion on of the textual language in § 4 and the practical consequences that failing to apply the "look through" approach would create. *See id.* at 62, 65 (finding that the textual provisions in the statute, along with the "curious practical consequences" that would result if the "look through" approach was not applied, was critical to the Court's holding).

[10] *See infra* notes 91–107 and accompanying text.

[11] *See infra* notes 14–55 and accompanying text.

[12] *See infra* notes 56–90 and accompanying text.

[13] *See infra* notes 91–107 and accompanying text.

[14] *See* Buckeye Check Cashing v. Cardegna, 546 U.S. 440, 443 (2006) (finding that the FAA put agreements to arbitrate "on equal footing with all other contracts"); *see also* Hall St. Assocs., L.L.C., v. Mattel, 552 U.S. 576, 581 (2007) (noting that Congress enacted the FAA to remedy judicial hostili-

utes created a judicial framework to ensure that arbitration agreements were upheld pursuant to contract.[15] Prior to 1984, federal courts were divided on the question of whether the FAA's substantive law applied in state courts as well as federal courts, because the FAA does not contain an explicit preemptive provision and Congress's purpose was not to displace all state arbitration law.[16] In *Southland Corp. v Keating*, the Supreme Court attempted to resolve this divide and held that the substantive law created by the FAA is applicable in both state and federal courts.[17]

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ty towards arbitration and to put arbitration on the same grounds as other contracts); Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RES. L. REV. 91, 92–93 (2012) (noting that, per the House and Senate Reports, the goal of the FAA was to defeat judicial hostility towards arbitration by positioning arbitration agreements on the "same footing as other contracts"). Prior to the enactment of the FAA in 1925, there was a significant amount of judicial hostility towards arbitration agreements. *See Hall*, 552 U.S. at 581 (explaining that Congress enacted the FAA to overcome judicial hostility towards arbitration). Despite parties having an arbitration agreement, courts would allow the party that no longer wished to arbitrate to revoke the arbitration agreement. *See* Wilson, *supra*, at 98. Courts justified this refusal to compel arbitration on the idea that parties could not decide to expel jurisdiction themselves and on the idea of fairness. *See id.* at 99 (explaining that some courts refused to compel arbitration agreements because they could not promise justice in arbitration proceedings).

[15] *See* Stipanowich, *supra* note 1, at 431 (commenting that one aspect of the judicial framework to enforce arbitration agreements was through speedy interlocutory review of decisions made by courts to compel or stay arbitration agreements according to the contract language). In enacting the FAA, Congress felt that courts had placed arbitration agreements on less equal footing than any other contract. *See Hall*, 552 U.S. at 581 (explaining that Congress enacted the FAA to overcome judicial hostility towards arbitration and put arbitration contracts on the same footing as other contracts); *see also Buckeye*, 546 U.S. at 443 (noting that the FAA was enacted to thwart judicial resistance towards arbitration). Therefore, one of the goals of the FAA was to ensure that judicial hostility towards arbitration agreements would dissipate by forcing the courts to treat arbitration agreements like all other contracts. *See Hall*, 552 U.S. at 581; Wilson, *supra* note 14, at 100 (explaining that § 2 of the FAA was enacted to put arbitration agreements on "the same footing as other contracts").

[16] *See, e.g.*, Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 202 (1956) (holding that where the FAA does not cover a contract, state arbitration law prevails). *But see, e.g.*, Volt Info. Scis., v. Bd. of Trustees of LeLand Stanford Junior Univ., 489 U.S. 468, 477 (1989) (explaining that even where Congress has not explicitly displaced state law, if state law stands in the way of the objectives of Congress, it will be preempted); Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (finding that federal law preempts state law when the state law interferes with the objectives and purposes of Congress); Sakkab v. Luxottica Retail N. Am., 803 F.3d 425, 431–32 (9th Cir. 2015) (finding a state law is preempted if it contradicts the objectives of the FAA). The FAA does not contain a clear preemption provision and Congress never intended to have all arbitration governed exclusively by the federal government. *See Volt*, 489 U.S. at 477 (finding that the FAA does not embody a congressional intent to govern all arbitration).

[17] *See* Southland Corp. v. Keating, 465 U.S. 1, 16 (1984) (finding that Congress intended the substantive law of the FAA to be applicable to both state and federal courts so that no state could undermine its goal of putting arbitration agreements on the same level as all other contracts). It would not have made sense for Congress to limit the FAA to only federal courts because in doing so, a state that disagreed with placing arbitration on equal footing as contracts could undermine the entire goal of the FAA. *See id.* (noting that the FAA is a substantive body of law that applies in both state and federal courts in order to prevent states from undermining the purpose of the FAA).

Federal courts often disagree over whether to apply the "look through" approach to the FAA.[18] Section A of this Part provides an overview of the FAA and its policies.[19] Section B describes the *Vaden* decision, applying the "look through" approach to the FAA.[20] Section C details the factual background, procedural history, and holding of *Ortiz-Espinosa*.[21]

A. The Federal Arbitration Act, Its Policies, and Its Confusion

In the early to mid 1900s, arbitration agreements became increasingly prominent in business contracts and transactions; yet, courts often refused to compel these arbitration agreements.[22] Businesses became wary of the courts' hostility towards arbitration agreements and lobbied Congress for a change.[23] Congress responded by enacting the FAA with the intent to make arbitration agreements equal to all other contracts, and to extricate the judicial hostility towards arbitration.[24] The FAA has since morphed into a national policy favor-

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[18] *See infra* notes 63–90 and accompanying text.

[19] *See infra* notes 22–34 and accompanying text.

[20] *See infra* notes 35–41 and accompanying text.

[21] *See infra* notes 42–55 and accompanying text.

[22] *See* Wilson, *supra* note 14, at 98–99 (describing that despite arbitration agreements becoming more popular, courts would not always enforce the arbitration agreements). Courts resisted compelling arbitration on the basis that parties cannot force jurisdiction out of the courts and based on the idea of fairness. *See id.* at 99 (explaining that courts were defiant in compelling arbitration agreements because jurisdiction could not be "oust[ed]" and there was no certainty that the individuals involved would be treated fairly in arbitration proceedings). Fairness was a premise for refusing to compel arbitration agreement because the court could not guaranty that rights would be protected in arbitration. *See id.*

[23] *See id.* at 102 (noting that although the FAA was intended to put arbitration agreements on equal ground as other contracts, the Supreme Court began favoring them over other contractual agreements). Businesses became incredibly reliant on arbitration agreements and were displeased with the judicial hostility towards arbitration agreements, so they lobbied Congress. *See id.* (explaining that businesses lobbied Congress to create legislation that would force the courts to enforce arbitration agreements). In response, Congress adopted the FAA and created a national policy that favored arbitration agreements. *See id.* at 99 (commenting that in response to the business community's lobbying efforts, Congress enacted the FAA). Courts then heavily relied on the FAA, which created a policy of pro-arbitration decisions. *See id.* at 102 (noting that the court's heavy reliance on the FAA created a policy that favored arbitration agreements); *see, e.g.*, Vaden v. Discover Bank, 556 U.S. 49, 58 (2008) (finding that in enacting the FAA, Congress created a policy that favored arbitration); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 421 (1967) (Black, J., dissenting) (commenting that the majority was generous in enforcing arbitration agreements because it furthers the liberal policy that Congress created favoring arbitration).

[24] *See* Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 302 (2015) (noting that the policy of the FAA was to overcome judicial hostility towards arbitration agreements and put them on the same ground as other contracts); *Sakkab*, 803 F.3d at 434 (holding that the goal of the FAA was to defeat judicial decisions that refused to enforce arbitration agreements); Rachel Arnow-Richman, *Modifying At-Will Employment Contracts*, 57 B.C. L. REV. 427, 448 (2016) (explaining that the FAA restricts the grounds on which a court can void an arbitration agreement);Wilson, *supra* note 14, at 98, 100 (finding that the FAA was enacted to put arbitration agreements on equal footing as other contracts).

ing arbitration when the parties have contracted to resolve disputes in this manner, even if a state law does not favor arbitration.[25]

The FAA is applicable to agreements to arbitrate in any transaction involving commerce or in any maritime transaction.[26] Whether this provision, § 2 of the FAA, created a substantive or procedural body of law was unclear until the Supreme Court's decision in *Southland*.[27] In *Southland*, the Court held that the FAA is a substantive body of law that is binding on both federal and state courts.[28] The Court reaffirmed its position that the FAA does not on its own confer federal jurisdiction.[29] Therefore, federal jurisdiction over controversies involving arbitration cannot be based on the FAA's relevant substantive law; there must be an independent jurisdictional basis to access a federal forum.[30]

In the Supreme Court's decision in *Volt Information Sciences, Inc. v. Board of Trustees of LeLand Stanford Junior University*, the Court recognized that although the FAA applies to both state and federal courts, parties can agree to arbitrate under state law as long as the state law does not conflict with the

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[25] *See* AT&T Mobility v. Concepcion, 563 US 333, 345–46 (2016) (holding that the FAA created a national policy that favored arbitration despite contradicting state law); *Vaden*, 556 U.S. at 58 (finding the FAA created a national policy that favored arbitration when parties agreed to resolve disputes in that manner); *Moses H. Cone Memorial Hosp*., 460 U.S. at 24–25 (1983) (Rehnquist, J., dissenting) (finding that as a matter of law, the FAA dictates that doubts regarding the scope of arbitration agreements should be decided in favor of arbitration).

[26] 9 U.S.C. § 2.

[27] *See Southland*, 465 U.S. at 12, 14 (noting that the legislative history behind the FAA had ambiguities regarding whether the FAA applied to state courts or purely federal forums or whether it was a procedural law or substantive law). In *Southland,* the Supreme Court held the FAA created a substantive body of law that was equally applicable in state and federal court. *See id.* at 16.

[28] *See id.* at 16 (holding that Congress intended the FAA to be a body of substantive federal law that mandates that parties arbitrate when they contracted to do so and is applicable to both federal and state courts). Despite the ambiguities in the legislative intent of the FAA, the Court in *Southland* held that the FAA preempted state law and reaffirmed that the FAA created a body of substantive law. *See id.* at 15–16. The Court in *Southland* reasoned that because it was Congress's intent to place arbitration agreements on the same footing as contracts, Congress could not have intended to limit arbitration disputes solely to federal jurisdiction because doing so would have placed contracts and arbitration agreements on unequal footing. *See id.*; *Moses H. Cone Memorial Hosp*., 460 U.S. at 24 (finding that the FAA is a body of substantive federal law).

[29] *See Vaden*, 556 U.S. at 59 (holding that although the FAA is a body of substantive law it does not convey federal jurisdiction in itself); Doscher v. Sea Port Grp. Sec., LLC, 832 F.3d 372, 382 (2d Cir. 2016) (emphasizing that the FAA provides no federal jurisdiction on its own and there must be an independent jurisdictional basis over the dispute). The result of the FAA creating a body of substantive federal law applicable in state courts is that in order for there to be federal jurisdiction over a case, there has to be an independent jurisdictional basis other than the FAA. *See Doscher*, 832 F.3d at 382 (commenting that because the FAA did not provide federal question jurisdiction over a case, there had to be an independent jurisdictional basis over the issue in order to obtain access to a federal forum).

[30] *See Hall*, 552 U.S. at 581–82 (holding that because the FAA is somewhat odd and does not confer jurisdiction itself, there must be an independent basis to exercise federal jurisdiction); *Vaden*, 556 U.S. at 59 (reaffirming the holding in *Hall* that because the FAA does bestow subject matter jurisdiction, there must be an independent basis over the dispute in order to access a federal forum).

objectives of the FAA.[31] In *Hall Street Associates v. Mattel Inc.*, the Court provided additional guidance on when state law could displace the FAA.[32] State law could displace the FAA if it was explicitly written into the arbitration agreement that state law would govern the arbitration agreement.[33] Although *Volt* and *Hall* both recognized that state law could displace the FAA in certain instances, the decision created uncertainty in determining if federal or state courts had jurisdiction over staying litigation, compelling arbitration, and confirming, modifying, or vacating post–arbitration awards, when the original arbitration agreement had no explicit jurisdictional clauses.[34]

B. The Court in Vaden Addresses Jurisdiction Over Arbitration Agreements

In 2009, the Supreme Court in *Vaden* sought to resolve the split among Federal Circuit Courts over whether jurisdiction to compel arbitration was based on the arbitration agreement itself or on the underlying controversies to which the arbitration agreement related.[35] The Court held the latter and found it appropriate to "look through" to the underlying controversy to determine whether there was federal or state jurisdiction over § 4 petitions to compel arbitration.[36] In its decision, the Court examined the language of § 4 and found that the text indicated that a federal court should determine its jurisdiction by looking through a § 4 petition to the underlying dispute.[37] The phrase in § 4, "save for [the arbitration] agreement" guided the court to its holding that a dis-

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[31] *See Volt*, 489 U.S. at 479 (finding where the parties agreed to arbitrate under state law, enforcing the state law according to the agreement does not conflict with the objectives of the FAA).

[32] *See Hall*, 552 U.S. at 590 (explaining the FAA isn't the only way into court and parties can agree to enforcement under state law).

[33] *See Ortiz-Espinosa*, 852 F.3d at 42 (reading *Hall* to hold that the FAA can only be displaced by state law if the parties explicitly agree to do so). If there are no explicit provisions in the arbitration agreement, the FAA will apply. *See id.*

[34] *See id.* (finding that under *Hall,* where the FAA applies, it may only be displaced by state law if the parties agree to do so explicitly). What wasn't answered in *Hall* was whether a court should look at the arbitration agreement itself or the underlying issue that the controversy is based upon to determine if federal or state law should apply. *See Vaden*, 556 U.S. at 63 (noting the majority of Court of Appeals believed that to determine jurisdiction over arbitration agreements, a court should not "look through" the arbitration agreement to the underlying controversy).

[35] *Compare* Cmty. State Bank v. Strong, 485 F.3d 597, 606 (11th Cir. 2007) (finding that the court may "look through" a § 4 petition to see if it has jurisdiction on an independent basis from the FAA), *with* Wisconsin v. Ho-Chunk Nation, 463 F.3d 655, 659 (7th Cir. 2006) (declining to apply the "look through" approach to determine jurisdiction for a § 4 petition to compel arbitration and instead basing jurisdiction on the arbitration agreement).

[36] *See* Vaden v. Discover Bank, 556 U.S. 49, 53 (2008) (holding that the court may "look through" a § 4 motion to compel arbitration to the underlying controversy to see if it would have jurisdiction). A § 4 petition allows an aggrieved party to petition the court to compel arbitration when the opposing party refuses, fails, or neglects to arbitrate as provided for in an arbitration agreement. *See* 9 U.S.C. § 4 (2012); *Vaden*, 556 U.S. at 75.

[37] *See Vaden*, 556 U.S. at 62 (explaining that the text "save for [the arbitration] agreement" in § 4 was crucial to its holding).

trict court should determine whether it had jurisdiction if, absent the arbitration agreement, it would have subject matter jurisdiction over the matter.[38]

The *Vaden* decision to apply the "look through" approach to § 4 petitions avoided the "curious practical consequences" of a situation where a federal court could only entertain a § 4 petition if there was already a separate federal issue before the court.[39] Instead, by "looking through" to the parties' underlying dispute, a federal court could compel arbitration without first requiring the petitioner to formally file or remove the federal issue the party sought to arbitrate in the first place.[40] Although the decision in *Vaden* provided guidance in applying the "look through" approach to § 4 petitions of the FAA, it left unanswered the question of whether the look through approach should be applied to other provisions within the FAA that omitted the same language as § 4.[41]

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[38] *See id.* (instructing a court to decide if it would have subject matter jurisdiction over the controversy between the parties in the absence of the arbitration agreement).

[39] *See id.* at 65 (holding that it would be a questionable result for a federal court to only have jurisdiction over a § 4 petition if it had a federal-question suit already before the court, it was a diversity case, or if it involved a maritime contract). If the "look through" test was not applied to a § 4 petition to compel arbitration, it would have created "curious practical consequences" since it would result in a federal court only being allowed to hear federal question cases if it involved a maritime contract or if the suit arose under diversity of citizenship. *See id.* (explaining the "curious practical consequences" that would result if the "look through" approach was not applied). The decision in *Vaden* allowed federal courts jurisdiction over arbitration agreements that arose out of a purely federal question issue. *See id.* (explaining that federal courts could "look through" a § 4 petition to determine if it had jurisdiction over the underlying issue).

[40] *See id.* (explaining how the "look through" approach allows a federal court to determine if they have subject matter jurisdiction over the arbitration agreement without requiring the parties' to file a separate suit in federal court). The *Vaden* decision aligns with the goals of Congress in creating the FAA because rather than making a party litigate the issue it wished to arbitrate first, it allows the judge to compel arbitration first. *See id.* (finding that allowing a court to "look through" a § 4 petition to determine if it had jurisdiction over the matter saved the parties from having to first litigate the same issue it contracted to arbitrate in the first place); Moses H. Cone Memorial. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (noting that the FAA reflects a liberal policy favoring arbitration). There are "curious practical consequences" when a party would be able to file a suit in federal court arising out of an issue that the parties agreed to arbitrate but would not be able to file a petition to compel arbitration over the same issue in federal court. *See Vaden*, 556 U.S. at 65.

[41] *See Vaden*, 556 U.S. at 62 (holding that the "look through" was appropriate for a § 4 petition to establish whether the action was governed by federal law). The key language in § 4 of the FAA that *Vaden* relied on was "save for [the arbitration] agreement" and "would have jurisdiction under title 28." *See id.* (finding the "save for [the arbitration] agreement" and "would have jurisdiction under title 28" critical to the Court's holding that a federal court should "look through" a § 4 petition to determine jurisdiction). Following *Vaden*, the circuits split as to whether the "look through" approach was applicable to just § 4 petitions to compel arbitration or if it applied to the entire FAA. *See* Goldman v. Citigroup Glob. Mkts., 834 F.3d 242, 254 (3d Cir. 2016) (finding that the "look through" approach from *Vaden* did not extend to § 10 of the FAA); Magruder v. Fid. Brokerage Servs., 818 F.3d 285, 288 (7th Cir. 2016) (holding the "look through" basis was not appropriate for § 9 and/or § 10 petitions). *But see Doscher*, 832 F.3d at 389 (concluding that federal courts were permitted to apply the "look through" approach to § 10 petitions). The court in *Goldman* found that the "look through" approach should not apply to § 10 of the FAA since it does not contain the same key language as § 4 and Congress's intention in passing the FAA was based on enforcement of arbitration agreements. *See* 834

C. First Circuit Strives for Consistency and Applies the "Look Through" Approach to Other Provisions of the FAA in Ortiz-Espinosa v. BBVA Securities of Puerto Rico, Inc.

In 2006, Dr. Luis Ortiz-Espinosa and his wife ("Investors") opened two sets of brokerage investment accounts with BBVA Securities of Puerto Rico, Inc. ("BBVA").[42] By 2009, the Investors had suffered significant losses related to their investment accounts and sought relief against BBVA.[43] Pursuant to the brokerage agreement, which required the parties to resolve disputes through arbitration, the Investors filed a claim before the Federal Industry Regulatory Authority ("FINRA") against both BBVA and the broker managing the two accounts.[44] In their claim, the Investors asserted that BBVA and the broker managing their accounts engaged in a pattern of unsuitable investments in high risk securities with the sole intent of maximizing commissions for themselves, violating both federal and Puerto Rican securities law.[45] In 2012, after seventeen hearing sessions in Puerto Rico, the three–member arbitration panel issued an award in favor of BBVA and the broker.[46]

The Investors then filed a petition to vacate or modify the arbitration award under the Puerto Rico Arbitration Act ("PRAA") in the Puerto Rico Court of First Instance.[47] BBVA removed the case to the federal court in Puerto Rico, asserting that federal question jurisdiction existed because the underlying claims were based on federal securities law.[48] The Investors moved to remand

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F.3d at 254. In contrast, in *Doscher*, the court found the "look through" approach was applicable to § 10 of the FAA. *See* 832 F.3d at 389. The court in *Doscher* reasoned that failing to apply the "look through" approach would create the same "curious practical consequences" that *Vaden* avoided. *See id.*

[42] *See Ortiz-Espinosa*, 852 F.3d at 40 (explaining Dr. Luis Ortiz-Espinosa and his wife opened two accounts with BBVA Securities of Puerto Rico, Inc. ("BBVA")). The claimants deposited a combined $2,604,208 with BBVA. *See id.* (noting that of the money deposited with BBVA, $2,113,154 was deposited into personal accounts and $491,054 was deposited into retirement accounts).

[43] *See id.* (noting that the couple had lost a significant amount of money related to their two BBVA accounts). The claimants lost $2,049,240 in total. *Id.*

[44] *See id.* (finding the brokerage agreement stipulated for the arbitration of disputes before the Federal Industry Regulatory Authority ("FINRA")).

[45] *See id.* (remarking that the Investors claimed that BBVA and the broker deceived them by partaking in a series of high risk securities investments with the sole intent of maximizing trading profits and commissions in violation of federal and Puerto Rico law). Specifically, claimants alleged violations of § 10(b) of the Securities Exchange Act, Rule 10b-5 of the Securities Exchange Commission, and state and contract claims. *Id.*

[46] *See id.* at 41 (explaining that the arbitration panel ruled in favor of BBVA and the broker).

[47] *See id.* (noting the petitioners did not invoke the FAA but instead sought relief under PRAA). The claimants' motion to vacate or modify the arbitration award relied on various mistakes made by the arbitrators including a bias against the claimants and a refusal to hear additional evidence. *See id.*

[48] *See Ortiz-Espinosa*, 852 F.3d at 41 (explaining that BBVA argued that the federal district court had jurisdiction over the petition to vacate or modify the arbitration award because the underlying issues were based on federal law). BBVA asserted that the court should "look through" the petition to modify and vacate the arbitration to see what the underlying issue was based on and because it was

the claim to state court arguing that their complaint did not invoke the FAA, but rather only asserted a claim under the PRAA and therefore raised no federal question.[49]

In applying the "look through" approach, the United States District Court for the District of Puerto Rico denied the motion to remand and found that because the underlying controversy asserted federal claims, the district court had federal question jurisdiction.[50] The district court subsequently denied the Investors' petition to vacate or modify the arbitration award and entered a judgment confirming the award.[51] In response, the Investors appealed both the district court's denial of their motion to remand their case back to Puerto Rican state court and the district court's judgment confirming the arbitration award.[52]

On appeal to the First Circuit, the Investors argued that because they brought suit under PRAA and only asserted state law causes of action, it was not proper for the district court to apply the "look through" approach to obtain subject matter jurisdiction.[53] The First Circuit rejected this argument and held that notwithstanding the Investors bringing their petition to modify or vacate under the PRAA, the FAA preempts the PRAA because it applies to arbitration agreements "in any maritime transaction or a contract evidencing a transaction involving commerce."[54] In addition, the First Circuit held that the district court

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based on federal law, the district court had jurisdiction. *Id.* Defendants additionally argued that the court had supplemental jurisdiction over the state law claims. *Id.* Federal question jurisdiction provides federal courts the authority to hear matters that arise from the Constitution or laws of the United States. *See* Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125, 127–28 (explaining that in order to have federal question jurisdiction over a matter, a plaintiff must plead a cause of action that is derived from the Constitution or laws of the United States).

[49] *See Ortiz-Espinosa*, 852 F.3d at 42. The Investors argued that they brought a claim to vacate the arbitration award under Puerto Rican arbitration law not federal arbitration law. *See id.*

[50] *Id.* (explaining the Investors filed an interlocutory appeal of the district court's order denying their motion to remand; however the district court dismissed the appeal since the order was not a final decision under 28 U.S.C. § 1291).

[51] *See id.* (noting the district court denied the Investors' petition to modify or vacate the arbitration award). The court denied the Investors' petition to vacate or modify the arbitration award on grounds that they did not demonstrate any plausible ground for vacating or modifying the arbitration award. *Id.* The district court did not decide whether the FAA or PRAA standards for vacating or modifying the arbitration award applied, finding that because of the similarities between the FAA and PRAA regarding vacating or modifying an arbitration award, neither one warranted a change in the arbitration award. *Id.*

[52] *Id.* at 41–42

[53] *Id.* at 42. The claimants further argued that the text of the FAA only permits the application of the "look through" approach to § 4 petitions to compel arbitration and their petition was to modify or vacate the arbitration award. *Id.*

[54] *Id.* at 42 (holding *Hall* to read that where the FAA applies, it may only be displaced by state law if the parties agree to it explicitly). Here, the court found there was no language showing the parties contemplated enforcement under the PRAA and no language indicating the parties intended that state law would govern vacating or modifying the arbitration award, therefore the FAA is the applicable law. *Id.*

properly applied the "look through" approach to §§ 9–11 of the Investors' petition.[55]

II. CIRCUITS CONFLICT AGAIN IN APPLYING THE "LOOK THROUGH" APPROACH TO THE FAA

Although the *Vaden v. Discovery Bank* decision resolved the split among Federal Circuit Courts as to whether it was appropriate to apply the "look through" approach to § 4 of the Federal Arbitration Act ("FAA"), it provided little guidance regarding the rest of the FAA.[56] This ambiguity regarding where the "look through" approach should be applied, occurred in part, because of the dual reasoning the U.S. Supreme Court used to reach its conclusion.[57] The Court in *Vaden* relied heavily on both the text of § 4 and on the real-world consequences that would result if the "look through" approach was set aside.[58] The

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[55] *Id.* at 47.

[56] *See* Vaden v. Discover Bank, 556 U.S. 49, 62 (2008) (finding it is appropriate for a federal court to "look through" a § 4 petition to compel arbitration to the parties' underlying substantive controversy to see if there is subject matter jurisdiction). Prior to the *Vaden* decision, the U.S. Courts of Appeals for the Second, Sixth, and Seventh Circuits held that it was not proper to "look through" a § 4 petition to determine jurisdiction while in contrast, the U.S. Courts of Appeals for the Fourth and Eleventh Circuits held that a court could "look through" a § 4 petition to compel arbitration to determine if there was federal subject matter jurisdiction. *See id.* at 57 (finding that the lower courts were in conflict regarding whether a federal court could "look through" a § 4 petition to compel arbitration to determine if the court had jurisdiction); Cmty. State Bank v. Strong, 485 F.3d 597, 606 (11th Cir. 2007) (holding that the district court was correct in "look[ing] through" the underlying dispute to determine if it had jurisdiction over a § 4 petition); Discover Bank v. Vaden, 396 F.3d 366, 367 (4th Cir. 2005) (finding that to compel arbitration a court should determine if it has federal question jurisdiction over the underlying issue). *But see* Smith Barney, Inc. v. Sarver, 108 F.3d 92, 94 (6th Cir. 1997) (explaining that the FAA and the underlying claims of the arbitration agreement did not provide an independent basis for federal question jurisdiction); Westmoreland Capital Corp. v. Findlay, 100 F.3d 263, 264 (2d Cir. 1996) (holding that it was proper for the lower court to dismiss a petition to compel arbitration because it lacked jurisdiction even though the underlying claim was based on federal law); Prudential-Bache Sec., Inc. v. Fitch, 966 F.2d 981, 988 (5th Cir. 1992) (concluding that jurisdiction over a § 4 petition must be determined based on the face of the petition). After the *Vaden* decision, circuits continued to split as to whether *Vaden* applied to the entire FAA or exclusively to § 4. *Compare* Ortiz-Espinosa v. BBVA Sec. of P.R., 852 F.3d 36, 40 (1st Cir. 2017) (finding the "look through" approach to be appropriate to determine federal jurisdiction), *and* Doscher v. Sea Port Grp. Sec., 832 F.3d 372, 389 (2d Cir. 2016) (holding that federal courts may "look through" § 10 petitions to determine if the court had federal question jurisdiction over the underlying issue), *with* Goldman v. Citigroup Glob. Mkts., 834 F.3d 242, 254 (3d Cir. 2016) (concluding that the "look through" approach did not apply to § 10 petitions), *and* Magruder v. Fid. Brokerage Servs., 818 F.3d 285, 288 (7th Cir. 2016) (holding that the "look through" approach did not apply to § 9 or § 10 petitions).

[57] *See Vaden*, 556 U.S. at 62, 65 (explaining that its decision was driven by the text of § 4 and avoided "curious practical consequences").

[58] *See id.* at 62 (holding that the "save for [the arbitration] language" in § 4 of the FAA implies that courts should exercise their jurisdiction over a controversy by determining if absent the arbitration agreement it would have jurisdiction over the controversy between the parties under Title 28). Yet, in the same section of the Court's opinion, the Court concludes that in addition to the textual reasons for holding that the "look through" approach applies to § 4 petitions, there are also practical reasons for

Court's silence regarding the rest of the FAA left Federal Circuit Courts once again split when it came to applying the "look through" approach to sections outside of § 4 petitions of the FAA.[59]

Federal Circuit Courts have not been consistent in their application of the "look through" approach to provisions outside of § 4 of the FAA.[60] Section A of this Part details how the U.S. Courts of Appeals for the Second, Third, and Seventh Circuits have applied the "look through" approach to the FAA.[61] Section B of this part examines the First Circuit's decision in *Ortiz-Espinosa v. BBVA Securities of Puerto Rico, Inc*. to apply the "look through" approach § 9, § 10, and § 11 of the FAA.[62]

A. The Third and Seventh Circuits Stuck on the Statutory Language of the FAA

The U.S. Court of Appeals for the Seventh Circuit in *Magruder v. Fidelity Brokerage Services*, in 2016, relied almost exclusively on the statutory language differences within the different sections of the FAA to hold that the "look through" approach only applied to § 4 petitions to compel arbitration.[63] The U.S. Court of Appeals for the Third Circuit followed suit in *Goldman v. Citigroup Global Markets* in 2016, finding that the United States District Court for the Eastern District of Pennsylvania properly granted a Rule 12(b)(1) motion to dismiss a § 10 petition to vacate an arbitration award because it could not "look through" the petition to establish jurisdiction.[64]

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its application. *See id.* at 65 (finding that failing to apply the "look through" approach to § 4 petitions would have "curious practical consequences" because it would allow a federal court to entertain a § 4 petition only when there was a federal question already before the court). Applying the "look through" approach allows a § 4 petitioner to ask a federal court to compel arbitration without having to litigate the matter first, which was an essential goal of the FAA. *See id.*; *see also* AT&T Mobility v. Concepcion, 563 US 333, 345–46 (2016) (explaining that the FAA was designed to promote arbitration when the parties contracted to arbitrate disputes).

[59] *Compare Goldman*, 834 F.3d at 254–55 (concluding that *Vaden*'s "look through" approach for jurisdiction does not extend beyond § 4 of the FAA), *with Ortiz-Espinosa*, 852 F.3d at 44 (agreeing with the Second Circuit that the "look through" approach was not limited to § 4 petitions of the FAA). The rest of the FAA includes petitions to confirm, modify, and vacate arbitration awards. *See* Federal Arbitration Act, 9 U.S.C. §§ 9–11 (2012).

[60] *See infra*, notes 63–90 and accompanying text.

[61] *See infra*, notes 63–74 and accompanying text.

[62] *See infra*, notes 75–90 and accompanying text.

[63] *See Magruder*, 818 F.3d at 288 (finding that the provisions in § 9 and § 10 do not contain the "save for [this arbitration] agreement" language that the Supreme Court relied on in *Vaden* and thus, the "look through" approach did not apply to those sections). The fact that § 9 and § 10 of the FAA lacked the specific "save for [this arbitration] agreement" language contained in § 4 was fundamental to the Seventh Circuit's holding that a court could not "look through" a § 9 or § 10 petition to determine if it had jurisdiction over the arbitration agreement. *See id.*

[64] *See Goldman*, 834 F.3d at 254 (concluding unlike a § 4 petition, it was not proper to "look through" a § 10 petition to determine if the underlying claims were based on federal question jurisdiction). The petitioners in *Goldman* argued that a federal court should "look through" a § 10 petition to

Although the Third Circuit conceded that there were superficial reasons to treat a § 10 petition to vacate an arbitration award like a § 4 petition to compel arbitration, it ultimately found that the differences in statutory language between § 4 and § 10 were too vast to be treated alike.[65] The court in *Goldman* further supported its textual analysis by concluding that as a matter of policy, Congress intended to treat petitions to compel arbitration and motions to vacate arbitration awards differently.[66] The court in *Goldman* reasoned that when enacting the FAA, Congress focused on enforcing arbitration agreements and not reviewing arbitration awards; therefore, the textual differences between § 4 and § 10 were intentionally different.[67]

The U.S. Court of Appeals for the Second Circuit agreed with the Third and Seventh Circuits that the *Vaden* Court's reliance on the statutory language of § 4 was crucial to its holding, but the Second Circuit departed from its sister circuits in its finding that the "look through" approach could be applied to other sections of the FAA.[68] In *Doscher v. Sea Port Group Securities*, a claimant petitioned the court to modify an arbitration award based upon the underlying claim of federal securities fraud.[69] The Second Circuit emphasized the importance of statutory language in determining that the "look through" approach applied to sections outside of § 4 of the FAA.[70] The court found that when interpreting statutes, it is essential to read the statute as a whole because each

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vacate an award to see if it was predicated on an action that "arises under" federal law following the *Vaden* Court's holding. *See id.* at 252 (explaining that the petitioners argued that a § 10 petition should be treated the same way as a § 4 petition in determining jurisdiction). A Rule 12(b)(1) motion is a motion to dismiss a matter because the court lacks subject-matter jurisdiction. *Id.* at 248.

[65] *See id.* at 252 (finding that a close reading of the *Vaden* decision weakened the plaintiff's superficial reasoning to treat a § 10 petition like a § 4 petition). The court found treating § 4 motions to compel arbitration and § 10 motions to vacate arbitrations awards the same purely because they were in the same FAA had superficial appeal when the statutory language differences were evaluated. *See id.* at 253 (holding that the textual provisions in § 4 were central to the Court's decision in *Vaden* and § 10 lacks the "save for [this arbitration] agreement" language that § 4 contains).

[66] *See id.* at 254 (finding that Congress intended to treat petitions to compel arbitration and motions to vacate differently, which is why the language of § 4 cannot be interpreted to apply to § 10); Minor v. Prudential Sec., 94 F.3d 1103, 1107 (7th Cir. 1996) (noting that the primary federal interest in enacting the FAA was to enforce arbitration agreements and not to review arbitration decisions, so it makes sense that Congress wanted to give federal courts more power to enforce arbitration agreements rather than review the arbitration awards).

[67] *See Goldman*, 834 F.3d at 254 (holding that Congress's central interest in creating the FAA was to enforce arbitration agreements and not to review the arbitration decisions).

[68] *See Doscher*, 832 F.3d at 381–82 (finding that the differences in the statutory language of § 10 of the FAA and § 4 should not be minimized). The court in *Doscher* held that the "look through" approach is applicable to § 10 of the FAA. *Id.* at 389.

[69] *Id.* at 374 (explaining that the claimant began arbitration over an alleged breach of contract and a claim for securities fraud under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission). The claimant sought more than $15 million in damages and was awarded around $2.3 million by the arbitration panel. *Id.*

[70] *Id.* at 381–82 (holding that the text of § 4 drove the court's decision to adopt the "look–through" approach to § 10 petitions).

provision is dependent upon the context of the entire statute.[71] The court went on to hold that the "look through" approach should be applied to a § 10 petition to vacate an arbitration award in order to avoid the unacceptable result of allowing courts to have jurisdiction over pre–award enforcement of an arbitration agreement but not post-award enforcement.[72]

The court further disagreed with the Third and Seventh Circuits' policy rational that Congress's only concern in enacting the FAA was the enforcement of arbitration agreements and post-award judicial review.[73] The Second Circuit reasoned that if Congress's only focus had been the enforcement of arbitration, Congress would not have added the substantive sections that provide the rules for vacating, modifying, and confirming arbitration awards.[74]

B. Ortiz-Espinosa Expands the "Look Through" Approach to Multiple Sections of the FAA

In 2017, in *Ortiz-Espinosa*, the U.S. Court of Appeals for the First Circuit expanded the Second Circuit's decision in *Doscher* and held the "look

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[71] *See id.* at 382 (noting the preferred meaning of one statutory section is one that harmonizes it with the entire statute). A statute should be read as a whole since the meaning of the language within each provision is dependent upon the context. *See id.* (explaining that language within a statute depends upon the context).

[72] *Id.* at 386–87 (holding that failing to apply the "look through" approach to all provisions of the FAA creates a "totally artificial distinction," which *Vaden* rejected). The court in *Doscher* wanted to avoid the same "curious practical consequences" that *Vaden* sought to avoid. *See id.* (noting that applying the "look through" approach to the FAA in its entirety prevented the unusual practical consequences that the *Vaden* Court avoided). *Doscher* further found if the Court's decision in *Vaden* was based on the textual language exclusively, then § 4 would have the effect of conferring subject matter jurisdiction, which the FAA does not do. *Id.* at 388; *see also Vaden*, 556 U.S. at 59 (noting that the FAA is a unique in the sense that it does not confer subject matter jurisdiction in itself and there must be an independent jurisdictional basis); 2 DOMKE ON COMMERCIAL ARBITRATION *Federal Question Jurisdiction* § 32:12, Westlaw (database updated Nov. 2017) (explaining that the FAA does not provide federal jurisdiction by itself, but there has to be an independent basis that provides a federal question and thus, gives the court subject matter jurisdiction).

[73] *See Doscher*, 832 F.3d at 387 (finding that Congress created independent provisions to compel arbitration and to confirm, vacate, or modify arbitration awards and there is no reason why Congress would have made some provisions more enforceable than others).

[74] *See id.* (explaining that if Congress was only concerned about compelling arbitration, it would not have needed to create sections regarding the enforcement of arbitration awards). The *Goldman* court found that the primary interest in enacting the FAA was to enforce arbitration agreements, not review arbitration awards. *See Goldman*, 834 F.3d at 254 (noting that Congress's primary concern was not how courts reviewed arbitration decisions, but rather, how courts enforced arbitration agreements). Thus, it would follow that Congress would provide mechanisms to ensure that federal courts could enforce arbitration agreements, but not provide the same tools to a federal court to review the arbitration award. *See id.* (concluding that because of Congress's primary goal regarding the FAA, it would make sense that the tools to enforce arbitration are different than the ones to review arbitration awards).

through" approach applied to §§ 9, 10, and 11 of the FAA.[75] The First Circuit found that the "look through" approach created one single jurisdictional test to apply to the FAA and avoided the "curious practical consequences" that concerned the Supreme Court in *Vaden*.[76] Instead of focusing on the differences in statutory language between §§ 9–11 and § 4, the court in *Ortiz-Espinosa* focused on creating a unified jurisdictional approach.[77] The First Circuit found that if the "look through" test is not applied to §§ 9–11 of the FAA, the result would give a federal court jurisdiction to compel arbitration but for the same issue the court could not enforce the arbitration award that it compelled in the first place.[78] The result of failing to apply the "look through" approach to enforce an arbitration award has the potential to create inconsistencies among arbitration decisions.[79] The First Circuit explained that inconsistencies were a

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[75] *See Ortiz-Espinosa*, 852 F.3d at 47 (holding that the "look through" approached applied to §§ 9, 10, and 11 of the FAA). Sections 9–11 of the FAA give the courts power to review arbitration awards by confirming, modifying, or vacating them. 9 U.S.C. §§ 9–11 (2012). Under the FAA, once an arbitration award has been issued, there must be a judicial decree confirming, vacating, modifying, or correcting the award under §§ 9–11. *See Ortiz-Espinosa*, 852 F.3d at 42 (explaining that §§ 9–11 provide courts with the power to confirm, vacate, or modify an arbitration award). Section 9 of the FAA requires the court to confirm an award after it has been issued unless it is vacated, modified, or corrected under §§ 10 and 11. *Id*. at 47 (noting that a court must confirm an arbitration award under § 9 of the FAA unless the award has been modified, vacated, or corrected under § 10 and § 11). Section 10 of the FAA gives the courts the power to vacate an arbitration award due to corruption, fraud, undue means, arbitrator misconduct, or due to an arbitrator exceeding their powers. *See* 9 U.S.C. § 10 (giving a court the power to vacate an arbitration award). Section 11 of the FAA allows the courts to modify or correct the arbitration awards where there was a material mistake in calculating the award or the award was imperfect and does not reflect the merits of the controversy. *See id*. § 11 (providing courts with the power to modify or correct arbitration awards).

[76] *See Ortiz-Espinosa*, 852 F.3d at 46 (finding that giving a federal court jurisdiction to compel arbitration but not enforce the arbitration award would result in an absurd distinction between cases filed in the same court, where applying the "look through" approach to the entire act creates one single jurisdictional basis). For example, if the "look through" approach was not used, a federal court would have the power to compel arbitration per the *Vaden* decision under § 4 of the FAA, yet once the arbitration award was given, it would have no jurisdiction to confirm the arbitration award. *See id.* (explaining that if the "look through" approach is not used, a situation could arise where a federal court could compel arbitration, but a state court would be enforcing the arbitration award).

[77] *See id.* at 44 (noting there are statutory differences in the language of § 4 and §§ 9–11 since the latter sections don't contain the same language "save for [the arbitration] agreement"). Section 4 petitions to compel arbitration deals with pre–award enforcement of arbitration agreements, whereas §§ 9–11 petitions deal with post–award enforcement—that is, confirming, vacating, modifying, or correcting an arbitration award. *See id.* (describing the differences between §§ 9–11 petitions, which deal with post-award enforcement, and § 4 petitions, which deal with pre-award enforcement). Despite the statutory differences, the court found it more practical to have one jurisdictional approach that is equally applicable to all provisions of the FAA. *See id.* at 46 (finding that the "look through" approach creates a uniform method in determining jurisdiction to provisions in the FAA).

[78] *See id.* (holding that the "look through" approach provided a unitary approach to jurisdictional issues arising under the FAA).

[79] *See id.* at 47 (finding that making litigants go back to state court to enforce an arbitration award has the potential to create inconsistencies between federal and state court decisions). The court found it strange to refuse a federal forum where the underlying claim is based on an exclusive federal juris-

possibility when federal courts could be involved in the pre-award enforcement to compel arbitration under § 4, but state courts would have jurisdiction over enforcing that same arbitration award.[80]

Additionally, the court found the "look through" approach applied to §§ 9–11 because it is the only approach that provides broad federal jurisdiction over the proceedings to enforce post-arbitration awards.[81] Compelling courts to enforce arbitration agreements was a key objective of the FAA.[82] When Congress enacted the FAA it wanted to overcome judicial hostility towards arbitration agreements by compelling the courts to treat arbitration equal to contracts.[83] The court explained it would not make sense that Congress would have intended to exclude federal jurisdiction in enforcing post-arbitration awards when the enforcement of arbitration awards in general was the primary objective of the FAA.[84] The First Circuit did not believe that Congress only intended federal courts to have jurisdiction over §§ 9–11 petitions in instances of diversity or admiralty.[85] Thus, by applying the "look through" approach to §§ 9, 10, and 11, the First Circuit expanded the Supreme Court's decision in *Vaden* and found it proper for the district court to "look through" the Investors' petition to vacate or modify post arbitration awards in order to determine if the court would have jurisdiction over the underlying controversy.[86]

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diction claim such as the Securities Exchange Act of 1934 and allow a state court to decide federal law. *Id.*

[80] *See id.* (explaining that it would be inconsistent to allow federal courts to enforce arbitration but then allow state courts sole jurisdiction in enforcing the arbitration awards that resulted from the same dispute).

[81] *See id.* at 42 (holding that enforcing arbitration agreements in the first place was a primary goal of the FAA but the post–arbitration award enforcement was central to that goal). The structure of the FAA was meant to combat delays and expenses that were associated with litigation when there was already an arbitration agreement in place. *See id.* (noting that the FAA was designed to increase efficiency in making arbitration agreements enforceable); *see also Doscher*, 832 F.3d at 387 (noting that if Congress only intended there to be federal jurisdiction over § 4 petitions to compel arbitration, it would have been unnecessary to enact § 10 or § 11 of the FAA; therefore those provisions were intended to have a substantive effect).

[82] *Ortiz-Espinosa*, 852 F.3d at 42.

[83] *See id.* (finding both the enforcement of arbitration agreements and the post-arbitration remedies of arbitration were central goals of the FAA); *see also* Wilson, *supra* note 14, at 92, 99 (explaining how prior to the enactment of the FAA, some courts would refuse to enforce an arbitration agreement when one of the parties no longer wanted to arbitrate the issue that it had agreed to arbitrate in the agreement).

[84] *See Ortiz-Espinosa*, 852 F.3d at 43 (explaining that by including §§ 9–11 in the FAA, Congress intended there to be federal court review of post-arbitration awards); *see also Hall*, 552 U.S. at 581 (finding that the FAA created mechanisms for enforcing arbitration awards).

[85] *See Ortiz-Espinosa*, 852 F.3d at 45 (holding that it makes little sense to remove federal jurisdiction over post-arbitration awards when there is a federal question at issue).

[86] *See* Vaden v. Discover Bank, 556 U.S. 49, 62 (2008) (holding that when determining subject matter jurisdiction, the court should "look through" the § 4 motion to compel arbitration to see if it would have jurisdiction over the underlying controversy); *Ortiz-Espinosa*, 852 F.3d at 47 (concluding that the "look through" approach applied to §§ 9–11 of the FAA).

After the *Vaden* decision, it is settled law that the "look through" approach applies to § 4 petitions to compel arbitration.[87] Following *Ortiz-Espinosa*, the First Circuit held that the "look through approach" also applies to § 9 petitions to confirm arbitration awards, § 10 petitions to vacate arbitration awards, and § 11 petitions to modify arbitration awards.[88] The Second Circuit held that the "look through" approach applies to § 10 petitions to vacate arbitration awards.[89] In contrast, the Third and Seventh Circuits held that the "look through" approach applies exclusively to § 4 petitions and does not apply to other provisions in the FAA.[90]

III. THE "LOOK THROUGH" APPROACH SHOULD BE APPLIED CONSISTENTLY TO ALL PROVISIONS OF THE FAA

The U.S. Court of Appeals for the First Circuit in *Ortiz-Espinosa v. BBVA Securities of Puerto Rico, Inc.* correctly extended the *Vaden v. Discovery Bank* "look through" approach to §§ 9, 10, and 11 of the Federal Arbitration Act ("FAA") to determine which court, state or federal, has subject matter jurisdiction.[91] Section A of this Part argues that although the differences in statutory language are important, the rigid textual reliance that the U.S. Courts of Appeals for the Third and Seventh Circuits placed on § 4 of the FAA were misplaced, and differences in the statutory language of provisions within the same statute should be read harmoniously.[92] Section B of this Part also argues that

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[87] *See Vaden*, 556 U.S. at 62 (holding that the "look through" approach applies to § 4 petitions to compel arbitration).

[88] *See Ortiz-Espinosa*, 852 F.3d at 47 (finding that the "look through" approach also applies to §§ 9–11 petitions).

[89] *See Doscher*, 832 F.3d at 389 (holding that the "look through" approach is applicable to § 10 of the FAA).

[90] *See* Goldman v. Citigroup Glob. Mkts., 834 F.3d 242, 254 (3d Cir. 2016) (concluding that the "look through" approach did not extend to § 10 petitions to vacate arbitration awards); Magruder v. Fid. Brokerage Servs., 818 F.3d 285, 288 (7th Cir. 2016) (holding that the "look through" approach did not apply to § 9 and § 10 petitions because those provisions lacked the "save for [this arbitration] agreement" language contained in § 4, which was fundamental to the Supreme Court's decision in *Vaden*).

[91] *See* Ortiz-Espinosa v. BBVA Sec. of P.R., 852 F.3d 36, 47 (1st Cir. 2017) (finding that the *Vaden* court's "look through" approach extended to §§ 9–11 of the FAA); *see also* Vaden v. Discover Bank, 556 U.S. 49, 62 (2008) (holding that it is appropriate for a federal court to "look through" a § 4 petition to compel arbitration to the parties' underlying substantive controversy to see if there is subject matter jurisdiction).

[92] *See* Goldman v. Citigroup Glob. Mkts., 834 F.3d 242, 253 (3d Cir. 2016) (finding that the textual differences between § 4 and § 10 of the FAA were crucial in the court's decision not to apply the "look through" approach to § 10 petitions); Magruder v. Fid. Brokerage Servs., 818 F.3d 285, 288 (7th Cir. 2016) (explaining that neither § 9 nor § 10 had comparable language to § 4 of the FAA). *But see* Doscher v. Sea Port Grp. Sec., 832 F.3d 372, 382 (2d Cir. 2016) (concluding that despite the textual differences between § 10 and § 4, a statute should be read as a whole). Both *Magruder* and *Goldman* found that the "look through" approach was not appropriate to apply to provisions in the FAA outside of § 4 because they did not contain the same language as § 4. *See Goldman*, 834 F.3d at 253;

applying the "look through" approach to the entire FAA promotes consistency and avoids the "curious practical consequences" that the U.S. Supreme Court in *Vaden* sought to avoid.[93]

A. Textual Differences Alone are not Enough to Apply Different Jurisdictional Tests

There is no question that the inclusion or exclusion of specific statutory language should be given great weight; however, the statute must be read and interpreted as a whole because the meaning of the language is contextually dependent.[94] For federal jurisdiction, courts have focused on interpreting the meaning of statutory language in the context of the entire statute rather than specific provisions to ensure federal jurisdiction is not applied differently to provisions within an act when Congress did not intend to do so.[95] Because the textual differences among the provisions in the FAA alone are not enough to warrant different jurisdictional approaches, Congressional intent must be explicit to warrant treating the provisions differently.[96]

Furthermore, because the Supreme Court made it clear in *Vaden* that the FAA does not on its face create federal jurisdiction, its reliance on the textual language in § 4 cannot be taken in isolation.[97] If the text alone was what the

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Magruder, 818 F.3d at 288. *But see Ortiz-Espinosa*, 852 F.3d at 45 (holding that a difference in the statutory language of provisions within an act does not compel a holding by itself). The statutory language of provisions should be examined by reading the whole statute together because the meaning of a section is dependent the context of the entire statute. *See Doscher*, 832 F.3d at 382. In *Merrill Lynch, Pierce, Fenner & Smith v. Manning*, the Court found that the language "brought to enforce" and "arising under" had the same meaning in regards to determining federal jurisdiction. *See* 136 S. Ct. 1562, 1570–71 (2016) (finding different words to have the same meaning regarding jurisdiction); *see also Ortiz-Espinosa*, 852 F.3d at 45 (referencing the holding in *Merrill Lynch*).

[93] *See Vaden*, 556 U.S. at 65 (finding that it would result in "curious practical consequences" to allow a federal court jurisdiction over a § 4 petition only when there was already a federal issue claim before the Court); *Ortiz-Espinosa*, 852 F.3d at 46 (holding that there would be "curious practical consequences" to allow federal jurisdiction over a motion to compel arbitration, but deny it to enforce the arbitration award over the identical controversy).

[94] *See* King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991) (noting that the cardinal rule is that a statute should be read as a whole rather than as individual provisions because construing statutory language is dependent upon the context of the entire statute); *Doscher*, 832 F.3d at 382 (finding that a statute should be read as a whole because the meaning of the language is contextually dependent).

[95] *See Merrill Lynch*, 136 S. Ct. at 1576 (holding that the different provisions in the statute, "brought to enforce" and "arising under," had the same meaning with respect to determining jurisdiction).

[96] *See Magruder*, 818 F.3d at 288 (holding that the "look through" approach applies to § 4 of the FAA but not to the provisions outside of it because they contain different statutory language); *Goldman*, 834 F.3d at 253 (finding that the "look through" approach applied to § 4 of the FAA but not to § 10 since § 10 did not contain the "save for [the arbitration] agreement" language that the Court in *Vaden* relied upon). *But see Doscher*, 832 F.3d at 386 (explaining that if Congress only wanted federal courts having the ability to compel arbitration then it did not need to include § 10 or § 11 of the FAA).

[97] S*ee Vaden*, 556 U.S. at 59 (noting that the FAA does not create federal jurisdiction in itself, but rather allows access to a federal forum); Southland Corp. v. Keating, 465 U.S. 1, 12 (1984) (quoting

Vaden decision was based upon, then the Court read into the FAA the power to create subject matter jurisdiction—a power courts have been clear to reject.[98] The Court has made it clear that for a federal court to have jurisdiction over the FAA, there must be an independent jurisdictional hook; therefore, it is a stretch to reason that the text of § 4 alone provides federal courts with jurisdiction to "look through" an arbitration agreement governed by the FAA.[99] Thus, contrary to the Third and Seventh Circuits, the textual differences within the provisions of the FAA are not enough to justify different jurisdictional applications within the same statute.[100]

B. Applying the "Look Through" Approach Avoids "Curious Practical Consequences"

Instead of basing jurisdiction on artificial textual distinctions, the "look through" approach should be applied to the entire FAA because it creates consistency and prevents the "curious practical consequences" that the Supreme Court in *Vaden* sought to avoid.[101] It would have been strange for Congress to

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Moses H. Cone Mem'l. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 (1983)) (explaining that the body of federal substantive law created by the FAA applied to both state and federal courts); *see also* Szalai, *supra* note 4, at 323 (noting that there must be an independent basis for subject matter jurisdiction for a federal court to enforce the provisions of the FAA).

[98] *See* Hall St. Assocs., L.L.C., v. Mattel, 552 U.S. 576, 581–82 (2007) (reaffirming that the FAA does not create federal jurisdiction, and that there must be an independent jurisdictional basis to reach the federal courts); *Doscher*, 832 F.3d at 382 (finding that the FAA does not provide subject matter jurisdiction, so therefore there must be an independent jurisdictional basis for a federal court to have jurisdiction); *see also* 2 DOMKE ON COMMERCIAL ARBITRATION., *supra* note 72 (explaining that a party must establish an independent basis for subject matter jurisdiction that is independent of the FAA for a federal court to have jurisdiction over the arbitration agreement).

[99] *See* Szalai, *supra* note 4, at 323 (explaining that there has to be an independent basis for a federal court to have subject matter jurisdiction over the FAA).

[100] *See Goldman*, 834 F.3d at 253–54 (finding that the different language of § 4 and § 10 warranted different jurisdictional approaches); *Magruder*, 818 F.3d at 288 (explaining that § 9 and § 10 do not have the similar language of § 4 and therefore should be treated differently). *But see Ortiz-Espinosa*, 852 F.3d at 45 (noting that a difference in language between sections of a statute does not mandate that the sections be treated differently). In the *Vaden* decision, the Court focused on the statutory language of § 4 of the FAA "save for [the arbitration] agreement" in reaching its conclusion that the "look through" approach should be applied to determine subject matter jurisdiction. *See* Federal Arbitration Act, 9 U.S.C. § 4 (2012); 556 U.S. at 62 (noting that the textual provisions in § 4 were essential in finding that the "look through" approach should be applied to determine subject matter jurisdiction over petitions to compel arbitration). Sections 9, 10, and 11 all omit the "save for [the arbitration] agreement" text relied on so heavily in *Vaden*, which has caused the split in circuits over the applicability of the "look through" approach to the rest of the FAA. 9 U.S.C. §§ 9–11; *see Goldman*, 834 F.3d at 253 (explaining that § 10 lacks the "save for [this arbitration] agreement" language that § 4 contains). Although the inclusion of specific statutory language is important, it is not always considered determinative. *See Merrill Lynch*, 136 S. Ct. at 1576 (holding the statutory context is needed to understand the language of a particular provisions); *Ortiz-Espinosa*, 852 F.3d at 45 (commenting that differences in statutory language do not mandate that the sections should be treated differently).

[101] *See Ortiz-Espinosa*, 852 F.3d at 45 (finding that if the "look through" approach is not applied to the provisions outside of § 4, then there would be no way for a federal court to have jurisdiction to

only intend there to be federal jurisdiction to compel arbitration, yet to enforce the arbitration award, arising from the same arbitration, there would be no federal jurisdiction.[102] If this was Congress's intention in enacting the FAA, Congress would not have needed to include §§ 9–11 in the FAA.[103]

The Court in *Vaden* did not exclusively rely on the textual provisions in § 4 of the FAA; therefore, its secondary support seeking to avoid "curious practical consequences" cannot be overlooked.[104] It would result in similar "curious practical consequences" to allow federal courts to compel arbitration yet not allow those courts to enforce, vacate, or modify the arbitration award that arose out of the same issue.[105] Thus, it would be a mistake to fail to apply the "look through" approach to other sections of the FAA.[106] Such a mistake would result in creating the same "curious practical consequences" that the Court in *Vaden* avoided.[107]

CONCLUSION

The First Circuit in *Ortiz-Espinosa* correctly extended the Supreme Court's decision in *Vaden* by expanding the "look through" approach to §§ 9–11 of the FAA. Applying the "look through" approach creates consistency in compelling arbitration and vacating, modifying, or enforcing the arbitration award based on the same underlying issue. The "look through" approach aligns with Congress's intention of overcoming judicial hostility towards arbitration agreements by allowing federal courts to have power to enforce post-arbitration awards. Further, applying the "look through" approach to the FAA

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enforce the post-arbitration award except for in cases in diversity and maritime instances); *Doscher*, 832 F.3d at 386–87 (failing to apply the "look through" approach creates the "totally artificial distinctions" that *Vaden* dismissed).

[102] *See Ortiz-Espinosa*, 852 F.3d at 46–47 (noting that it would be inconsistent to be denied a federal forum when the underlying federal issue is based on a federal law); *Doscher*, 832 F.3d at 387 (holding that to allow federal jurisdiction for petitions to compel arbitration where the underlying controversy is a federal issue yet forbid federal court enforcement of the post-award enforcement of the same issue would be an absurd distinction).

[103] *See Doscher*, 832 F.3d at 386 (concluding that if Congress only cared about federal courts having the ability to compel arbitration then it did not need to include § 10 or § 11 of the FAA).

[104] *See supra* notes 35–41 and accompanying text.

[105] *See Ortiz-Espinosa*, 852 F.3d at 46 (finding that it would be strange to allow federal jurisdiction over a § 4 petition to compel arbitration but not to confirm or vacate an arbitration award based on the same underlying claim).

[106] *See id.* at 47 (holding that the "look through" approach applies to §§ 9–11 of the FAA).

[107] *See id.* at 46 (finding that failing to apply the "look through" approach would create the unusual practical consequence that the *Vaden* court wanted to avoid). In *Vaden* the Court applied the "look through" approach in order to avoid the "curious practical consequences" of being able to litigate an issue in federal court but not have federal jurisdiction over that same issue to compel arbitration. *See* 556 U.S. at 65 (explaining that the "curious practical consequences" that would result if the "look through" approach was not used when determining jurisdiction over a § 4 petition to compel arbitration).

consistently avoids the "curious practical consequences" that the Court in *Vaden* sought to prevent. Thus, the textual reliance that the Third and Seventh Circuits placed on the different provisions within the FAA were misplaced. If the text of § 4 in the FAA was the only reason the Court in *Vaden* applied the "look through" test, the "save for [the arbitration] agreement" language, in effect, expanded a federal court's jurisdiction over the FAA because it bestowed a federal court with the power to examine an arbitration agreement without having independent subject matter jurisdiction over the arbitration agreement, which is contrary to almost every precedent the Supreme Court has decided regarding the FAA.

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